

**THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD INDIAN RESERVATION**

**INDIAN PREFERENCE ORDINANCE
TRIBAL ORDINANCE NO. 101A**

**PART I
TITLE, AUTHORITY, AND SCOPE OF APPLICATION**

Section 1.1 Title. The following Ordinance shall be known and cited as the Confederated Salish and Kootenai Tribes' Indian Preference Policy Ordinance.

Section 1.2 Authority. This Ordinance is enacted pursuant to the Constitution and Bylaws of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, as approved by the Secretary of Interior on October 28, 1935, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended. CS&KT Const., Art VI, Sec. 1, §§ (a), (n), and (u); CS&KT Bylaws, Art. II, Sections 4 and 6.

Section 1.3 Purpose. The Tribal Council, entrusted with protecting the political integrity, economic security, and the health and welfare of the Tribes, seeks to counter the effects of discrimination against Indians and to promote Tribal and individual economic self-sufficiency. Therefore, the Council enacts this Ordinance so that preference granted to qualified Indian employees and qualified Indian-owned entities within the boundaries of the Flathead Indian Reservation whenever permitted by Federal law.

Section 1.4 Applicability. This Ordinance applies to entities that provide goods and/or services to CSKT, CSKT agencies, and CSKT owned entities; and to entities awarded contracts for construction projects within the exterior boundaries of the Reservation which are funded wholly or in part by Federal funds. This Ordinance shall not apply to grants or contracts negotiated between the Tribes and other governmental entities, unless such application is a provision of the grant or contract. Entities to which this Ordinance applies shall comply with its terms and implementing regulations unless specifically excepted under the terms of the Ordinance or otherwise prohibited by Federal Law.

**PART II
GENERAL PROVISIONS**

Section 2.1 Definitions. The following definitions apply to this Ordinance and implementing regulations:

A. "CERTIFIED CSKT MEMBER-OWNED BUSINESS" means any business, entity, corporation, partnership, joint stock company, joint venture, or individual or sole proprietorship which the Indian Preference Commission certifies to be at least 51% CSKT member-owned.

B "CERTIFIED INDIAN-OWNED BUSINESS" means any business, entity, corporation, partnership, joint stock company, joint venture, or individual or sole proprietorship which the Indian Preference Commission certifies to be at least 51% Indian owned.

- C. “CONTRACT” means any and all written agreements that consist of an offer, consideration, and acceptance for procurement or disposal of goods or services including but not limited to, contracts for construction, supplies, services, and equipment.
- D. “COORDINATOR” means the Indian Preference Coordinator.
- E. “COUNCIL” means the duly elected governing body of the Confederated Salish and Kootenai Tribes of the Flathead Nation.
- F. “CSKT” means the Confederated Salish and Kootenai Tribes.
- G. “CSKT member” means any person who is recognized in accordance with the Constitution of the CSKT as a member of CSKT.
- H. “EMPLOYER” means any entity that employs person(s) for wages or other remuneration.
- I. “ENTITY” means any contractor or subcontractor to which this Ordinance and its implementing regulations apply.
- J. “INDIAN” means any person who is an enrolled member of any Indian tribe, band, group, pueblo, or community, which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs and any “native” as defined in the Alaska Native Claims Settlement Act.
- K. “INDIAN PREFERENCE EMPLOYEE” means any eligible individual who is reasonably qualified to work.
- L. “JOINT VENTURE” means a one-time grouping of two or more persons in a business undertaking.
- M. “RESERVATION” means the Flathead Indian Reservation of the Confederated Salish and Kootenai Tribes.
- N. “RESPONSIBLE BIDDER” means a bidder that the CSKT determine has the skill, ability, and integrity to perform the project.
- O. “RESPONSIVE BID” means a bid that meets all requirements of the Proposal and Instructions to Bidders portion of the solicitation for bid.
- P. “TAPO” means the CSKT Tribal Administrative Procedures Ordinance, Tribal Ordinance 86B.

Section 2.2 Repealer. This Ordinance repeals all previous Indian Preference resolutions.

Section 2.3 Severability. If any provision of this Ordinance is found by the Tribal or Federal Court to be unconstitutional or unlawful, said provision(s) shall be struck and the remainder of the Ordinance shall remain in full force and effect.

Section 2.4 Effective Date. The effective date of this revised Ordinance is February 5, 2009.

PART III INDIAN PREFERENCE

Section 3.1 Indian Preference in Employment. Unless otherwise prohibited by federal law, all employers and entities to which this Ordinance applies shall give hiring preference first to enrolled CSKT members and second to other Indians.

Section 3.2 Indian Preference and Priority in Contracting and Subcontracting. Preference for the award of contracts and subcontracts and for the procurement of services, materials, supplies, and equipment required for the work to be performed, shall be given to Certified Indian-owned businesses which are responsible bidders and make responsive bids in the award of any contract or subcontract to which this Ordinance applies. Preference for contracting and subcontracting shall be granted according to the following priority:

- A. First preference is a CSKT member-owned business. If a CSKT member-owned business comes within 10% of the low bid or price quote, the CSKT business shall have the opportunity to meet that figure.
- B. Second Preference is any other Indian-owned business. If no CSKT member-owned business makes or meets the low bid or price quote, any other Indian-owned business which comes within 10% of the low bid or price quote shall have the opportunity to meet that figure.

PART IV INDIAN PREFERENCE COORDINATOR

Section 4.1 Establishment. This Ordinance establishes the position of Indian Preference Coordinator. The Coordinator's duties shall include but are not limited to the following topics:

- A. Regulations. The Coordinator shall formulate and propose for the Council's adoption or amendment regulations reasonably necessary to carry out the provisions of this Ordinance in accordance with and subject to the Tribal Administrative Procedures Ordinance (TAPO), Ordinance No. 86B.
- B. Applications. Applicants for preference shall apply to the Coordinator, who has authority to evaluate and approve or reject all applications.
- C. List of Preference Employees and Businesses. The Coordinator shall be responsible for keeping a current list of Indian preference employees, Certified CSKT Member-Owned Businesses and Certified Indian-owned businesses.
- D. Monitoring. The Coordinator shall monitor for compliance all work to which this Ordinance applies. As part of the monitoring function, this Ordinance authorizes the Coordinator to audit records of employers to whom the Ordinance applies.

E. Enforcement. The Coordinator shall issue notices of noncompliance and opportunity for cure to alleged violators. This Ordinance authorizes the Coordinator to recommend sanctions when monitoring reveals that an entity is in violation of the Ordinance or implementing regulations.

Section 4.2 The Coordinator shall not delegate rule making authority, monitoring, or enforcement powers.

PART V INDIAN BUSINESS CERTIFICATION

Section 5.1 Application Process for Certification as an Indian-Owned Business. A firm seeking certification as an Indian-owned business must present its application and the required documentation to the Indian Preference Coordinator whose decision on the application shall constitute a final decision for the purpose of satisfying administrative process.

Section 5.2 Documentation Required. A complete application for certification as an Indian-Owned Business shall include:

- A. Proof of applicant business owner(s) membership in an Indian tribe;
- B. Documentation of business ownership and management by one or more Indian(s); and
- C. Documentation of the business's profit arrangement.

Section 5.3 Joint Ventures. All Joint ventures seeking preference priority as CSKT member-owned or Indian-owned businesses shall submit documentation of the business arrangements of the joint venture in addition to the required documentation for certification.

Section 5.4 CSKT Member-Owned Business. To qualify for certification as a CSKT member-owned business when ownership consists of both CSKT member(s) and other Indians, CSKT member(s) shall document that they own 51% of the business.

Section 5.5 Criteria for Certification as an Indian-Owned business. To become a Certified Indian-owned business, an applicant shall meet the following criteria:

- A. Ownership. The business is 51% or more Indian-owned, as established by:
 - 1. Financial Ownership. At least 51% ownership is vested in one or more Indians.
 - 2. Value provided. The Indian owner(s) provide real value commensurate with the value of their ownership share by providing capital, equipment, real property or similar assets, or engineering or professional services.
 - a) When Indian participants demonstrate that they were unable to borrow from normal capital sources because they are Indians, and therefore were unable to pay real value for their 51% or more Indian ownership, they may satisfy the ownership requirement by demonstrating further that they extended their capital-raising

capability as far as possible, such that the Indian participants are clearly at risk in the business.

b) It will not be considered real value if the Indian(s) purchased the ownership share, directly or indirectly, when the ultimate creditor is the non-Indian owner of the firm or an immediate relation thereof.

3. Profit distribution. In any profit distribution, the Indian owner(s) receive profits proportional to their ownership interest. If any provision in the organizational agreement of the business gives the non-Indian owner(s) a greater share of the profits, in whatever form and under whatever name, such as through management fees, equipment rental fees, or bonuses tied to profits, certification will be denied. The Indian Preference Coordinator shall review salary scales to ensure that salaries are not being used to circumvent the requirement that owners receive salaries proportional to ownership interest.

B. Management Control. The business must be able to demonstrate to the Indian Preference Coordinator's satisfaction that:

1. The Indians upon whose Tribal membership the preference is based control daily operations and have the majority of voting rights and other decisional authority;

2. All significant decisions of the business are made by a majority vote except where otherwise required by law;

3. The Indian owner(s) through prior experience or training have substantial ties to the area of business in which the firm is engaged such that they are competent to serve in the senior position;

4. The Indian owner(s) are sufficiently knowledgeable about the firm's activities to be accountable to the Tribes for those activities; and

5. The main purpose of establishing the business was not to become eligible for the priority which this Ordinance provides to Certified CSKT member-owned and Indian owned businesses. The Indian Preference Coordinator shall not consider the management of the business to be Indian if the business subcontracts 65% or more of its work to non-Indians. An entity operating thus shall be considered a front which does not qualify for certification as an Indian owned business and is ineligible for preference.

C. Exceptions to Management Control Criteria. The requirements listed above regarding experience, training, occupation requirements, and knowledge of the firm's activities may be waived when:

1. The firm is 100% Indian-owned, or

2. The firm is modeled on a publicly held corporation such that it is owned by 10 or more persons, of whom at least 70% are Indians, the Chief Executive Officer and the highest-salaried employee in the firm is/are Indian, and a majority of the employees are Indians.

D. Integrity of Structure. The Indian Preference Coordinator shall consider the following criteria to determine whether the applicant qualifies for preference:

1. History of the Firm. Whether the firm, a portion of the firm, or key actors in the firm originally were associated with a non-Indian owned business that gained little except eligibility for preference priority in terms of equipment capital or expertise, by adding Indian ownership or by merging with an Indian firm.
2. Employees.
 - a) Whether key non-Indian employees of the applicant are former employees of the non-Indian firm with which the Indian firm is or has been affiliated through a joint venture or other arrangement such that there is reason to believe the non-Indian firm controls the applicant.
 - b) Whether Indians are employed in all of the positions for which qualified Indians are available. A high percentage of non-Indian employees in such positions will provide reason to believe that the firm was established primarily to benefit non-Indians.
3. Relative Experience and Resources. Whether the non-Indian owner's experience, expertise and resources are so much greater than those of the Indian(s) that there is little reason for the non-Indian to accept a junior role in the firm or venture other than to be able to take advantage of the Indian preference program.

Section 5.6 Renewal of certification. Certified CSKT member-owned businesses and Certified Indian-owned businesses must renew their certification annually in order to remain eligible for the Indian-owned business preference.

PART VI MONITORING

Section 6.1 Compliance in Employment and Procurement of Goods and Materials.

- A. Notice. Requests for Bids shall include notice if the Ordinance applies to the contracted work, and entities who are awarded a contract will be notified in the award letter that the Ordinance must be followed when applicable. Such entities shall provide their compliance plan to the Coordinator within seven days following award of contract.
- B. Reports. Employers to whom this ordinance applies must submit wage and hour reports to the Coordinator within one week after payroll disbursement. Employers must report terminations, disciplinary action, and promotions to the Coordinator within two working days and in writing within one week thereafter.
- C. On-site Inspections. This Ordinance authorizes the Coordinator to make on-site inspections during regular working hours, speak with workers, review and copy all relevant records of an

entity/employer, and conduct any other investigatory action necessary to enforce the provisions of this Ordinance and implementing regulations.

PART VII ENFORCEMENT

Section 7.1 Contractor Responsibility. The contractor shall be responsible for ensuring that subcontractors comply with all preference requirements described in this Ordinance. Every contractor and subcontractor at every tier may be subject to sanctions provided herein for failure to comply with the Ordinance and implementing regulations.

Section 7.2 Violations. The following actions shall constitute acts of noncompliance with this Ordinance and implementing regulations:

- A. Failure to obtain advance approval for subcontracting, which varies from the preference requirements of this Ordinance.
- B. Conviction of a criminal offense involving the attainment or performance of a public or private contract, or a subcontract thereunder.
- C. Failure of a business to submit reports to the Coordinator documenting continued compliance with terms of its contract and this Ordinance.
- D. Failure of a business which has been granted preference priority to continue to meet the criteria required for maintaining its status.

Section 7.3 Notice of Noncompliance. When the Coordinator has reason to believe that an entity is out of compliance with the Ordinance or implementing regulations, the Coordinator shall issue a notice of noncompliance to the alleged violator. Such notice shall be served either personally or by registered or certified mail, and shall constitute a summons and complaint for purposes of the violation. The notice shall state the nature of the alleged violations, the type of sanction that may be assessed for each alleged violation, the right to answer, and the consequences of failing to answer. The notice may provide an opportunity to cure the alleged acts of noncompliance, and if so, the method and time for cure. The notice shall specify the date and place at which a hearing on each alleged violation will be held if the alleged violation is not cured. Such hearing shall be held not be less than 30 days or more than 60 days after the date of service of a notice.

Section 7.4 Answer. A person to whom a notice of noncompliance has been issued shall answer within 15 days of the date of receipt of the notice. The answer shall be personally served or mailed to the Coordinator by registered or certified mail. An answer shall either admit or deny the violation(s), raise all affirmative defenses, and state whether the entity will undertake curative measures, if any, specified in the notice of noncompliance. If an answer states that a person will undertake all curative measures specified in the notice, the hearing scheduled in the notice may be held in abeyance for a reasonable amount of time to enable completion of the curative measures. If curative measures are completed within a reasonable time and to the satisfaction of the Coordinator, the hearing may be canceled at the Coordinator's discretion. Satisfactory completion of curative measures does not obviate imposition of fines or penalties.

Section 7.5 Sanctions. The Coordinator is authorized to recommend imposition of sanctions from the following list against any person or entity who is found to be in violation of this Ordinance and its implementing regulation:

- A. Make changes in procedures and policies necessary to eliminate the violations;
- B. Suspend all operations subject to this Ordinance, and/or prohibit engagement in future operations to which this Ordinance applies until the identified violation is corrected;
- C. Withhold payment of contract earnings to the Contractor, as follows:
 - 1. Employment: For each instance where the Contractor fails to comply with the employment provisions, the penalty amount shall be an amount equal to 100% of the gross wages and earnings paid to non-Indian employees who were working in a position where qualified Indian preference employees were available at the time of hire of the non-Indian employee.
 - 2. Subcontracting: For each instance where the Contractor fails to comply with the subcontracting provisions, the penalty amount shall be an amount equal to 20% of the gross earnings paid to the non-Indian contractor.
 - 3. Procurement of services, materials, supplies, and equipment: For each instance where the Contractor fails to comply with the procurement of services, materials, supplies, and equipment provisions, the penalty amount shall be an amount equal to 20% of the procurement amount paid to the non-Indian preference vendor.;
- D. Deny the right to commence or continue business to which this Ordinance applies;
- E. Order any other provision the Commission deems necessary to eliminate the violation.

PART VIII ADMINISTRATIVE AND JUDICIAL REVIEW

Section 8.1 Grievance Procedure. TAPO shall provide the procedures for administrative and judicial review of all final orders arising under this Ordinance.

Section 8.2 Chief Executive Officer. As applied in this Ordinance, the “Chief Executive Officer” reference in Part VI, Section 25 of TAPO shall be the Indian Preference Coordinator.